Supreme Court, U.S.
FILED

02 238 AUG 12 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ROGER L. HICKMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. TRANT
Counsel of Record

900 S. GAY STREET
SUITE 1502
KNOXVILLE, TN 37902
(865) 525-7980

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

23 pp

QUESTION PRESENTED FOR REVIEW

I. SHOULD THE SUPREME COURT EXERCISE ITS SUPERVISORY POWER IN REVIEWING THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE THAT THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF COUNTS 3, 4 AND 5 UNTIL THE REPLY BRIEF?

II. SHOULD *APPRENDI V. NEW JERSEY* BE APPLIED RETROACTIVELY IN PETITIONS TO VACATE JUDGMENT PURSUANT TO 28 U.S.C. § 2255?

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed in this case:

Roger L. Hickman

United States of America

TABLE OF CONTENTS

Question Presented for Review i

I. SHOULD THE SUPREME COURT EXERCISE ITS SUPERVISORY POWER IN REVIEWING THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE THAT THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF COUNTS 3, 4 AND 5 UNTIL THE REPLY BRIEF? i

II. SHOULD *APPRENDI V. NEW JERSEY* BE APPLIED RETROACTIVELY IN PETITIONS TO VACATE JUDGMENT PURSUANT TO 28 U.S.C. § 2255? i

List of All Parties to the Proceeding ii

Table of Contents . . . . . iii-iv

Table of Authorities . . . . . v-vi

Opinions Below 1

Supreme Court Jurisdiction 1

Constitutional and/or Statutory Provisions Construed . . 1

Statement of the Case 2

Statement of Facts 2

Summary of Argument 3

Argument 3

I. SHOULD THE SUPREME COURT EXERCISE ITS SUPERVISORY POWER IN REVIEWING THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE THAT THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF COUNTS 3, 4 AND 5 UNTIL THE REPLY BRIEF? 3

II. SHOULD *APPRENDI V. NEW JERSEY* BE APPLIED RETROACTIVELY IN PETITIONS TO VACATE JUDGMENT PURSUANT TO 28 U.S.C. § 2255? 4

Conclusion 8

Appendix

Appendix A
United States Court of Appeals Eleventh Circuit Order, 5/31/02 . . . . . 1a

Appendix B
United States District Court, Middle District of Florida, Orlando Division, 3/19/02 . . . . . 4a

Appendix C
Elmwood Place Police Department [Fold-out] . 16a

TABLE OF AUTHORITIES

Cases Cited:

Apprendi v. New Jersey,
530 U.S. 466 (2000) 3, 4

Baldasar v. Illinois,
446 U.S. 222 (1980) 7

Barefoot v. Estelle,
103 S. Ct. 3383 (1983) 5, 7

Franklin v. Hightower,
215 F.3d 1196(11th Cir. 2000) 5

Jones v. United States,
224 F.3d 1251 (11th Cir. 2000) 5

Slack v. McDaniel,
120 S. Ct. 1595 (2000) 4

United States v. Briggs,
939 F.2d 222 (5th Cir. 1991) 5

Statutes and Rules Cited:

28 U.S.C. § 1254 . . . . . 1, 5

28 U.S.C. § 2253(c) 4

28 U.S.C. § 2253(c)(3) 5

28 U.S.C. § 2255 . . . . . 1, 2, 4, 5

United States Constitution, Sixth Amendment 1

OPINIONS BELOW

The United State District Court for the Middle District of Florida filed its Opinion on March 19, 2002, denying the Petitioner's motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 and dismissed the case and is unpublished and has been reproduced in the Appendix at pp. 4a-11a. On March 25, 2002, the District Court entered a modified Order and is unpublished and reproduced in the Appendix at p. 12a. On April 2, 2002, the District Court entered an Order denying Petitioner's request for a Certificate Appealability and is unpublished and reproduced in the Appendix at p. 13a. On May 31, 2002 the United States Court of Appeals for the Eleventh Circuit denied the Appellant's motion for certificate of appealability and is unpublished and reproduced in the Appendix at pp. 1a-3a.

SUPREME COURT JURISDICTION

The Order of the United States Court of Appeals for the Eleventh Circuit was filed on May 31, 2002, (Appendix at pp. 1a-3a). This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS CONSTRUED

Sixth Amendment

Rights of the accused. – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The Petitioner filed his Motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody on September 24, 2001 seeking relief from a conviction on July 21, 1999. Respondent filed an Answer to Petitioner's § 2255 petition on October 18, 2001. On December 7, 2001, Respondent filed a supplemental answer in opposition to Petitioner's motion to vacate.

On March 19, 2002, the District Court entered its Order denying Petitioner's § 2255 motion, (Appendix at pp. 4a-11a). On March 25, 2002, the District Court entered a modified Order, (Appendix at p. 12a). On March 29, 20002, the Petitioner filed a Notice of Appeal and Motion for Certificate of Appealability in the District Court. On April 2, 2002, the District Court entered an Order denying the Certificate of Appealability, (Appendix at p. 13a). On April 22, 2002, the Petitioner filed a Motion for a Certificate of Appealability in the United States Court of Appeals for the Eleventh Circuit. On May 31, 2002, the United States Court of Appeals for the Eleventh Circuit denied the Motion for Certificate of Appealability, (Appendix at pp. 1a-3a).

STATEMENT OF FACTS

On January 12, 1999, the Petitioner was arrested on drug charges and on February 18, 1999 a grand jury returned a five count superseding indictment. The Petitioner proceeded to trial and the District Court granted a judgment of acquittal on count two. The Petitioner was found guilty on

the remaining counts and the trial judge sentenced the Defendant to 168 months of imprisonment to be followed by five years of supervised release. The Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. In that appeal, Counsel failed to raise the issue that Defendant was prejudiced by the admission of Counts 3, 4 & 5 until his reply brief. Due to this error the Petitioner was procedurally barred from having this issue judged on the merits. Counsel also failed to raise the *Apprendi* grounds and as such was ineffective for not doing so. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

SUMMARY OF ARGUMENT

Petitioner received ineffective assistance of counsel for failure to raise the issue that defendant was prejudiced by the admission of Counts 3, 4 & 5 until the reply brief; ineffective assistance of counsel in violation of due process; unconstitutional sentence under *Apprendi*; the statute enhancing sentence of the defendant due to the quantity of drugs is unconstitutional and trial counsel was ineffective for not objecting to the criminal history computation. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) Because Petitioner contends cognizable claims and the parties disagree as to the facts, an evidentiary hearing in the district court should have been heard.

ARGUMENT

I. SHOULD THE SUPREME COURT EXERCISE ITS SUPERVISORY POWER IN REVIEWING THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE THAT THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF COUNTS 3, 4 AND 5 UNTIL THE REPLY BRIEF?

II. SHOULD *APPRENDI V. NEW JERSEY* BE APPLIED RETROACTIVELY IN PETITIONS TO VACATE JUDGMENT PURSUANT TO 28 U.S.C. § 2255?

Petitioner's petition was filed pursuant to 28 U.S.C. § 2255 in the United States District Court for the Middle District of Florida and was denied by the District Court in an Order entered on March 19, 2002 and a modified Order entered March 25, 2002. A COA was subsequently denied by the District Court on April 2, 2002. Copies of these orders are unpublished and are reproduced in the Appendix at pp. 4a-13a. This is the Petitioner's first petition under § 2255.

This petition was filed on September 24, 2001 seeking relief from a conviction on July 21, 1999, based on a guilty verdict for conspiracy to possess with intent to distribute cocaine hydrochloride, attempt to possess with intent to distribute cocaine hydrochloride and use of a communication facility to commit a felony. As grounds for relief, Petitioner claimed that ineffective assistance of counsel for failure to raise the issue that defendant was prejudiced by the admission of Counts 3, 4, & 5 until the reply brief; ineffective assistance of counsel in violation of due process; unconstitutional sentence under *Apprendi*; the statute enhancing sentence of the defendant due to quantity of drugs is unconstitutional; trial counsel was ineffective for not objecting to the criminal history computation. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Under 28 U.S.C. § 2253(c), Petitioner is required to obtain a COA prior to exercising his right to appeal. *Slack v. McDaniel*, 120 S. Ct. 1595, 1602 (2000). Petitioner must demonstrate a substantial denial of a constitutional right. This requires a showing that reasonable jurists could debate the resolution of the case in the District Court. *Id.*, at 1603-

1604. If, however, a claim has been dismissed both on its merits as well as procedural grounds, Petitioner must additionally demonstrate that jurists could reasonably find that the petition stated a cognizable claim for denial of a constitutional right and that the District Court may have been incorrect in its procedural determination. *Id.*, at 1604. *See also Barefoot v. Estelle*, 103 S. Ct. 3383 (1983).

In *Jones v. United States*, 224 F.3d 1251 (11th Cir. 2000), this Court held that a COA would be limited to those specific issues for which a substantial showing of a denial of a constitutional right has been made. *Id.*, at 1254. *See also Franklin v. Hightower*, 215 F.3d 1196, 1198-1199 (11th Cir. 2000). Nevertheless, where allegations of deprivation of constitutional rights are not contradicted by the record, a hearing must be held to make an evidentiary determination concerning such allegations. *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991).

Respondent filed an Answer to Petitioner's § 2255 petition on October 18, 2001. Respondent denied that Petitioner was entitled to any relief. On December 7, 2001, Respondent filed a supplemental answer in opposition to Petitioner's motion to vacate.

On March 19, 2002, the District Court entered its Order denying Petitioner's § 2255 motion, (Appendix at pp. 4a-11a), and on March 25, 2002, the Court entered a modified Order, (Appendix at p. 12a).

Petitioner's Notice of Appeal and Motion for Certificate of Appealability were filed on March 29, 2002. On April 2, 2002, the District Court entered an Order denying a COA. (Appendix at p. 13a.)

In compliance with 28 U.S.C. § 2253(c)(3), Petitioner continues to assert the issues identified in his petition as grounds for relief under § 2255. Further, Petitioner contends on appeal that his petition stated cognizable claims on these grounds. Because the parties disagree as to the facts, an evidentiary hearing in the district court was required.

1. (The Prejudicial Spillover) - Original trial and appellate counsel admitted in court that he made an error in his failure to raise the issue of the spillover effect of the phone counts to the conspiracy count until his reply brief. The Court would not take notice of that argument because it was first raised in the reply brief. The district court should have conducted an evidentiary hearing as to this allegation of ineffective assistance. There is certainly prejudice because the conspiracy count for which the Petitioner was convicted could not stand without proof of the telephone counts that were eventually dismissed.

Counsel's own admission of his ineffectiveness appears in his reply brief as follows:

> Unfortunately for Mr. Hickman, counsel did not raise this issue in his initial brief. It was raised in the reply brief after the government conceded error on counts three, through five. This is certainly not Mr. Hickman's fault. All fault rests with counsel. Therefore, the panel should rehear the case and address it on its merits rather than having the ultimate blame laid at Mr. Hickman's feet. A sixty-three year old man with a second grade education should not be sentenced to fourteen years in the federal penitentiary based upon the mistake of

> counsel. Therefore, this court should exercise its discretion and rehear the case.

It is because of this ineffective assistance that the Court held:

> Because these arguments were raised for the first time in appellant's Reply Brief, we decline to entertain them.

This constitutional claim of ineffective assistance is certainly debatable among jurists of reason and a court could resolve the issues in a different manner. It certainly raises questions that are adequate deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880 (1983)

2. (Improper Enhancement) - Secondly, the Petitioner has shown on the record of his prior convictions that there was no counsel or any waiver of counsel. Copies of these warrants are reproduced in the Appendix at pp. 14a-17a. Regardless of what the presentence report may have stated, the silence of these convictions as to counsel should have caused the District Court to conduct an evidentiary hearing as to the applicability of these convictions to his criminal history. The failure to conduct such an evidentiary hearing deprives the Petitioner of his right to effective assistance of counsel and his right to due process. *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980) Again, this is certainly an issue upon which reasonable jurists could differ and a court could proceed in a different manner.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

DOUGLAS A. TRANT, #6871
Counsel of Record
900 S. Gay Street
Suite 1502
Knoxville, TN 37902
(865) 525-7980

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 02-11712-C

[Filed May 31, 2002]

ROGER L. HICKMAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ORDER

Appellant has filed a motion for a certificate of appealability. Appellant appeals the denial of his motion to vacate, set aside, or correct sentence, which was filed pursuant to 28 U.S.C. § 2255.

In his motion to vacate, appellant alleged that (1) his appellate counsel was ineffective for failing to object that the conspiracy conviction was tainted by the inclusion at trial of evidence pertaining to the telephone facilitation counts; (2) his

sentence is illegal in light of *Aprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the indictment did not allege drug quantity; (3) Title 21 U.S.C. § 841 (b) is unconstitutional in light of *Apprendi*; and (4) his trial counsel was ineffective for failing to challenge the criminal history computation. Appellant's first claim is without merit. It is undisputed that the telephone facilitation counts were vacated on direct appeal because they were not supported by sufficient evidence. But that does not mean the evidence pertaining to the telephone facilitation counts should have been excluded as it was also relevant to the conspiracy count in any event. However, even assuming that evidence regarding the telephone facilitation counts should have been excluded, evidence pertaining only to the conspiracy count, which included trial testimony showing that appellant had actively sought entry into the drug business, and had engaged in repeated sales transactions of large quantities of cocaine, was sufficient to support the conspiracy conviction alone. We also find no prejudice from the introduction of the evidence as to the telephone facilitation counts. Accordingly, appellant cannot demonstrate that the conspiracy conviction was tainted by evidence regarding the telephone facilitation counts.

Appellant's *Apprendi* claims are procedurally barred and without merit. First, this Court has held that *Apprendi* does not apply retroactively to cases on collateral review. *United States v. McCoy*, 266 F.3d 1245, 1258-59 (11th Cir. 2001), petition for cert. filed, (U.S. Dec. 26, 2001) (No. 01-8115). Accordingly, appellant may not collaterally attack his conviction or sentence on the basis of Apprendi. Second, appellant's claims are without merit because his 168-month sentence falls below the statutory maximum penalty in 21 U.S.C. § 841(b)(1)(C). *See United States v. Sanchez*, 269 F.3d 1250, 1269 (11th Cir. 2001), cert. denied, 122 S.Ct. 1327 (2002). Furthermore, appellant's contention that § 841

is unconstitutional in light of Apprendi has been squarely rejected. *See United States v. Candelario*, 240 F.3d 1300, 1311 n. 16 (11th Cir.), *cert. denied*, 121 S.Ct. 2535 (2001).

Finally, appellant's claim that his trial counsel was ineffective for failing to challenge the criminal history computation is without merit. Appellant maintained that his "marijuana conviction from Knox County" and "firearms conviction from Elmwood Place" were improperly scored because they were not counseled cases. A review of the pre-sentence investigation report reveals that the marijuana conviction was a counseled case. Accordingly, that conviction was properly scored. The Elmwood conviction "did not reflect attorney representation." However, even assuming that this conviction was improperly scored, the error did not affect appellant's sentence because, in light of his conviction for driving under the influence, he still would have received two criminal history points, and his criminal history category would have remained at II. Accordingly, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01,146 L.Ed.2d 542 (2000).

/s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:99-cr-14-Orl-18JGG
(6:01-cv-1111-Orl-18JGG)

[Filed March 19, 2002]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
ROGER L. HICKMAN,	)
Defendant.	)
	)

ORDER

This case involves a motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 98, filed September 24, 2001) filed by Roger L. Hickman. The Government filed a timely response to the section 2255 motion in compliance with this Court's instructions and with The *Rules Governing Section 2255 Cases in the United States District Courts*. Defendant alleges

essentially two claims for relief in his motion: first, that he received ineffective assistance of counsel; and second, that the sentence imposed by the Court was unconstitutional.

Procedural History

Defendant was charged in a five-count superseding indictment with the commission of various crimes (Doc. No. 30, filed February 18, 1999). A jury trial was held, and, after the Government presented its case, the Court granted Defendant's motion for a judgment of acquittal as to count two. The trial continued, and Defendant eventually was found guilty as to counts one, three, four, and five (Doc. No. 55, filed April 9, 1999). The Court adjudicated Defendant guilty of one count of conspiracy to possess with intent to distribute cocaine hydrochloride (count one) and three counts of use of a communication facility to commit a felony (counts three, four, and five) (Doc. No. 68, filed July 22,1999).

The Court sentenced Defendant to imprisonment for a term of 168 months. Defendant filed a direct appeal with the Eleventh Circuit Court of Appeals, which entered a written, unpublished opinion in which the judgment as to count one was affirmed but the judgments as to counts three, four, and five were vacated. *See* Doc. No. 86, filed October 27, 2000. The Court subsequently entered a Judgment on Remand In A Criminal Case in which defendant was adjudicated guilty of count one of the superseding indictment and sentenced to imprisonment for a term of 168 months (Doc. No. 89, filed November 17, 2000). Defendant again appealed, and the Eleventh Circuit entered a written, unpublished opinion affirming the conviction and sentence. *See* Doc. No. 97, filed August 2, 2001.

Claim One

Defendant contends that he received ineffective assistance of counsel because of the following: 1) appellate counsel, on the initial direct appeal, did not argue, until filing the reply brief, that the jury's verdict on the conspiracy count was tainted by the evidence related to the telephone facilitation counts; 2) because of appellate counsel's failure to raise issue one until the reply brief, the appellate court did not hear an adequate argument concerning the sufficiency of the evidence with regard to the conspiracy count; and 3) counsel failed to object to the computation of Defendant's criminal history at the initial sentencing.

1. Issue One

Defendant claims that appellate counsel, on the initial direct appeal, did not argue, until filing the reply brief, that Defendant "was prejudiced by the admission of Counts 3, 4, & 5." The Eleventh Circuit noted in its opinion that Defendant argued for the first time m his Reply Brief "that the jury's verdict on the conspiracy count was tainted by the evidence related to the telephone facilitation counts" and then "decline[d] to entertain" the argument. *See* Doc. No. 86 at 2.

It is well established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright,* 725 F.2d 1282, 1291 (llth Cir.), *cert. denied,* 469 U.S. 956 (1984). The standard for analyzing ineffective assistance claims is the same for trial and appellate counsel. *Matire v. Wainwright,* 811 F.2d 1430, 1435 (11th Cir. 1987). The Eleventh Circuit has applied the Supreme Court's test for ineffective assistance at trial to guide its analysis of ineffective assistance of

appellate counsel claims. *Heath v. Jones,* 941 F.2d 1126,1130 (llth Cir. 1991), *cert. denied,* 502 U.S. 1077 (1992).[1]

Appellate counsel need not raise issues that he (or she) reasonably concludes will not be considered on the merits by the appellate court. *Francois v. Wainwright,* 741 F.2d 1275, 1285 (llth Cir. 1984). Likewise, appellate counsel need not brief issues reasonably considered to be without merit. *Alvord,* 725 F.2d at 1291. Appellate counsel must be allowed to exercise his (or her) reasonable professional judgment in selecting those issues most promising for review, and "[a] brief that raises every colorable issue runs the risk of burying good arguments "Jones v. Barnes, 463 U.S. 745, 753 (1983).

The record reflects that Defendant's appellate counsel raised two issues on direct appeal. Defendant's appellate counsel submitted an initial brief which was comprehensive, thorough, and well-argued. In fact, Defendant's appellate counsel successfully persuaded the appellate court to vacate the judgments as to counts three through five. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. *Cf. Thomas v. Scully,* 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by

---

[1] The Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the *Strickland* test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. The second prong of the *Strickland* test requires the defendant to show that the deficient performance prejudiced the defense. *Id.* at 687.

counsel clearly showed the thoroughness of counsel's work). The fact that this other issue might have succeeded in the appellate court "does not lead automatically to the conclusion that [Defendant] was deprived of a constitutional right when his lawyer failed to assert such a claim." *Woodfork v. Russell,* No. 92-4301, 1994 WL 56933 (6th Cir. February 24,1994) (unpublished opinion).

Moreover, Defendant has not shown that this issue would have been successful on appeal. Accordingly, the Court finds that appellate counsel's performance was not deficient and that Defendant has not demonstrated prejudice. Hence, this issue must fail.[2]

2. Issue Two

Defendant avers that because of appellate counsel's failure to raise issue one until the reply brief, the appellate court did not hear an adequate argument concerning the sufficiency of the evidence with regard to the conspiracy count.

This issue is basically a re-assertion of issue one. In other words, Defendant asserts that, as a result of the dismissal of counts three through five, there was insufficient evidence to support the conviction as to count one. Again, the Court finds that the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. Moreover, it is not clear that this issue would have been successful on

---

[2] In the event that Defendant also argues that trial counsel was in some manner deficient with regard to this matter, the Court finds that Defendant has not adequately identified the deficiencies.

direct appeal. In fact, the appellate court specifically found, without discussing the impact of the convictions for counts three through five, that there was sufficient evidence to support the conspiracy conviction. The Court determines that appellate counsel's conduct was reasonable and that Defendant has not shown prejudice with regard to this issue.

3. Issue Three

Defendant contends that counsel failed to object to his criminal history computation at the initial sentencing. According to Defendant, both his "marijuana conviction from Knox County, Tennessee" and his "firearms conviction from Elmwood Place, Ohio" are "silent as to whether [Defendant] had counsel"; therefore, neither conviction "should have been counted."

This issue is without merit. First, counsel did raise objections to the scoring of these convictions. *See* Addendum to the Presentence Report[3] The presentence investigation report ("PSI") reveals that, with regard to the Knox County, Tennessee convictions,[4] Defendant "was represented by an attorney." (PSI at 6.) Thus, this matter was properly scored. The Elmwood, Ohio conviction"did not reflect attorney representation"; however, even assuming the conviction was improperly scored, Defendant still would have had two criminal history points, resulting in the same criminal history

---

[3] Counsel's objections were based on the argument that the convictions "will be overturned by the date of sentencing ....

[4] There were actually two convictions: 1) possession of marijuana, and 2) driving under the influence.

category II. Consequently, the Court finds that counsel's conduct was reasonable and that Defendant has not shown prejudice.

Claim Two

Defendant argues that the sentence imposed by the Court was unconstitutional "under *Apprendi* because the jury did not convict [him] of any specific amount of cocaine in violation of [his] right to a jury trial, [and because] the indictment failed to attribute an amount of cocaine." Defendant also relies on *United States v. Buckland,* 259 F.3d 1157 (9th Cir. 2001), wherein the Ninth Circuit determined that the determinate sentencing provisions of the federal narcotics statute were unconstitutional on their face because they permitted the district judge to find, under a preponderance of evidence standard, a fact (i.e., drug quantity) that increased the defendant's maximum penalty exposure.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." As discussed by the Seventh Circuit Court of Appeals in *Talbott v. State of Indiana,* 226 F.3d 866, 868 (7th Cir. 2000),

> All *Apprendi* holds is that most circumstances increasing a statutory maximum sentence must be treated as elements of the offense-and, if the defendant has demanded a jury trial, this

> means that they must be established beyond a reasonable doubt to the jury's satisfaction. *Apprendi* does not affect application of the relevant-conduct rules under the Sentencing Guidelines to sentences that fall within a statutory cap.

"The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory maximum, and does not invalidate a court's factual finding for the purposes of determining the applicable Sentencing Guidelines." *United States v. Doggett,* 230 F.3d 160,166 (5th Cir. 2000), *cert. denied,* 531 U.S. 1177 (2001). Defendant's case does not fall within the *Apprendi* ruling because 1) Defendant was not sentenced beyond the statutory maximum, and 2) Defendant was not sentenced under an additional statute, not referenced in the indictment as was the case in *Apprendi*.[5]

Further, the Court does not find the *Buckland* case to be persuasive. First, the *Buckland* case is from the Ninth Circuit, not the Eleventh Circuit. Finally, the Court notes that the Ninth Circuit decided to rehear the *Buckland* decision en *banc. See United States v. Buckland,* 265 F.3d 1085 (9th Cir.

---

[5] Further, Defendant's sentence was proper under *Apprendi* since the Court's finding of the amount of drugs merely aided the Court in rendering the proper sentence within the statutory range authorized by the jury's verdict. *Apprendi* does not... extend so far as to preclude judges from determining the drug amount for purposes of relevant conduct." *United States v. Henderson,* 105 F. Supp. 2d 523, 527 n.8 (S.D.W. Va. 2000).

2001). As of the date of this Order, no further ruling has been made by the Ninth Circuit. This claim is without merit.

Any of Defendant's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 98, filed September 24, 2001) filed by Roger L. Hickman is DENIED, and this case is DISMISSED with prejudice.

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 19 day of March, 2002.

/s/_____
G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:99-cr-14-Orl-18JGG
(6:01-cv-1111-Orl-18JGG)

[Filed March 25, 2002]

UNITED STATES OF AMERICA, *Plaintiff,*	)
v.	)
ROGER L. HICKMAN, *Defendant.*	)

ORDER

The Court's Order entered on March 19, 2002 (Doc. No. 106) is modified as set forth below. The following sentence on page 8, is hereby deleted: "As of the date of this Order, no further ruling has been made by the Ninth Circuit." The following sentence shall replace the above-mentioned deleted sentence on page 8: "On January 18, 2002, the Ninth Circuit in *United States v. Buckland,* 277 F.3d 1173 (9th Cir. 2002), upheld the constitutionality of the federal narcotics statute." In all other respects, the Court's Order of March 19, 2002 (Doc. No. 106) shall remain in full force and effect and is otherwise unmodified.

DONE AND ORDERED in Chambers at Orlando, Florida, this 25 day of March, 2002.

/s/_____
G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:99-cr-14-Orl-18JGG
(6:01-cv-1111-Orl-18JGG)

[Filed April 2, 2002]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
ROGER L. HICKMAN,	)
Defendant.	)
	)

ORDER

Defendant's Request for A Certificate of Appealability (Doc. No. 110, filed March 29, 2002) is DENIED. Defendant has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2 day of April, 2002.

/s/_____
G. KENDALL SHARP
UNITED STATES DISTRICT JUDGE

APPENDIX C

Fold-out

Elmwood Place Police Department

ELMWOOD PLACE POLICE DEPARTMENT

SEAN P. McCORMICK
CHIEF OF POLICE

300 MAPLE STREET
ELMWOOD PLACE, OHIO 45216
OFFICE (513) 242-0754 FAX (513) 242-0757

Fax Transmittal Form

TO Douglas A. Trant

ATTN Attorney at Law

FAX NO 865-525-7896

FROM Sean P. McCormick
Police Chief

From: Donna (Operator)

Urgent
For Review
Please Comment
Please Reply

Date sent: 8/21/01

Time sent: 9:25 A.M.

Number of pages including cover page: 2

Message:

As per your request, Disposition Sheet for Roger L. Hickman, Ctl. #1400\292, S.S. #289-34-4625, cited 2/11/91, 2339 hrs. 65th and Vine St., Elmwood Place, Ohio 45216 for:

Improper transportation of firearms, L. O. C. (Left of Center).

Officers: Bomske/Newton

See Judgement, fine, cost, confinement.

The information contained herein, may be confidential and may also be attorney-privileged. The information is intended only for the official use of the individual or entity to whom it is addressed. If you are not the intended recipient or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any use, distribution or copying of this information is strictly prohibited. If you have received this facsimile by mistake, please notify use as soon as possible by phone and return the original to us. Please use via U.S. Postal Service to the following Address: Elmwood Place Police Department 300 Maple Street Elmwood Place, Ohio 45216. Thank You.

BEST AVAILABLE COPY

DISPOSITION SHEET

[redacted] VILLAGE OF ELMWOOD PLACE, OHIO
MAYOR'S COURT

DEFENDANT (AS SHOWN ON COMPUTER) LAST: HICKMAN FIRST: ROGER MIDDLE: L. TITLE:

CASE NAME: [redacted]

ADDRESS	CITY	STATE	ZIP	PHONE
RT. #4 BOX 26A	NEW TAZWELL	TN.	37825	615-626-7414

SEX	RACE	AGE	DATE OF BIRTH	HT	WT	HR	EYE	SOC SEC #	OPLIC#	STATE	YEAR
M	A	53	7-15-37	6'	245	GRY	BLU	289-34-4625			

CONTROL # 1W005292 LICENSE PLT # STATE YR POB TN. OTHER INFORMATION 14571

CHARGES	SECTION #	WARRANT #	PLEA	JUDGEMENT	FINE	COST	CONFINEMENT	PROSECUTING WITNESS
IMPROPER TRANSPORTATION OF FIREARMS IN M1	137.02	26456	N/C	G 3/21/91	500.00 + 250.00	16.00	30 days	
L.O.C.	72.06	26457	N/C	G 3/21/91	38.00	C/C		

ARRESTING OFFICER(S): BOMSKE/NEWTON

WITNESSESS NEEDED:

DATE OF OFFENSE: 2-11-91 TIME: 2339 LOCATION: 65TH & VINE ST.

DATE OF ARREST: " TIME: " LOCATION: "

ORDERS/COMMENT OF COURT

CRIMINAL HISTORY ENTERED: 4-29-91

BY: BS

This certifies that this is a true and exact copy of original [redacted] ADMINISTER

GENERAL SESSIONS COURT, KNOX COUNTY, TENNESSEE

16039-W AFFIDAVIT OF COMPLAINT

The affiant, Joey Cook, after first being duly sworn according to law, states that a criminal offense has been committed in Knox County, Tennessee, by the defendant, Roger L. Hickman whose last known address is Rt#3 Box 26A New Tazewell, TN, 37825

Further, affiant makes oath that the essential facts constituting said offense, the date of said offense, and the sources of affiant's information concerning said facts are as follows:

On 5-5-84 At Approximately 04:09 A.m. observed a vehicle traveling northbound on Hwy 33 near Quarry Rd in Knox County. Vehicle was being driven in a reckless manner by swerving from side to side of the roadway. Upon stopping vehicle, defendant was observed to be operating said vehicle. Defendant had a odor of marijuana about his clothing AND A partially burnt rolled cigarette resembling marijuana was found in Ash Tray. Also there was a odor of marijuana about the vehicle and defendant since he had been in possession of vehicle for Approximately 2 hours.

AFFIANT ADDRESS TELEPHONE NUMBERS

Joey Cook Evidence sent to Lab. KCSO 521-2444

Personally sworn to and subscribed by the affiant before me this 5 day of May, 19 84.

Judge, General Sessions Court

STATE WARRANT

To Any Lawful Officer of the State:

Information on oath in the form of an Affidavit of Complaint having been made to me that the offense of Possesion of Marijuana has been committed by the defendant, Roger L. Hickman, in Knox County, Tennessee, and it appearing from said affidavit (s) that there is probable cause to believe the said offense has been committed and to believe the said defendant committed it; you are, therefore, commanded in the name of the State of Tennessee forthwith to arrest the said defendant and bring him or her before the nearest appropriate magistrate in the county in which the defendant is arrested.

The defendant is required to appear in this Court at the time set out on this warrant to answer the charge contained herein. Appearance bond for the defendant is set at $ 500.00.

Issued this 5 day of MAY 19 84

Judge, General Sessions Court

108-W

WITNESSES:	ADDRESSES	TELEPHONE NUMBERS
David Hunter	KCSO	521-2444

DEPUTY CLERK

BY

CRIMINAL COURT CLERK
KNOX COUNTY, TN

OCC- Hickman Garage W/m

NO. 72333 G

A31100

STATE OF TENNESSEE
vs.
Roger L. Hickman W/M

Address Rt #3 New Tazewell, TN.

Offense Possession of Marijuana

Issued this 5 day of May, 19 86

RETURN

Came to hand and executed by arresting the defendant this 5th day of May, 19 86 at 0404 a.m./p.m.

By Cook

Officer: T.H.P.—County—M.V.E.—T.P.S.C.

Trial set: 6-6, 19 TC, at 1:30 p.m.

Continued to _____ M
Continued to _____ M
Continued to _____ M
Continued to _____ M
Continued to _____ M
Continued to _____ M

Bond set at $ 500.00

Atty. for Pros. _____

Atty. for Def. _____

Son 111471

Case 8621716 mmacc

☐ This warrant is cancelled at the request of the District Attorney General.

☐ This warrant is amended to charge the offense of _____

upon (agreement of the parties) (motion of _____).

Date _____ JUDGE _____

JUDGMENT

IT IS THE JUDGMENT OF THE COURT THAT:

☐ The charge is dismissed (after trial) (after Preliminary Examination).

☐ The defendant is found guilty of the offense of _____

and is taxed with the costs of this proceeding AND

☐ Is fined the sum of $ 50.00 AND

☐ Is sentenced to be confined in the Knox County Penal Farm or equivalent institution for a period of 6 M Susp. Det. B

☐ The defendant is bound to the Grand Jury pursuant to the attached record of Preliminary Examination. Bond is set at $ _____

☐ _____

This the 6 day of June, 19 86

Doran Bell
JUDGE

3

217

WAIVER AND PLEA

I understand that I have the right to be tried in Criminal Court upon an indictment or presentment by the Grand Jury. I also have the right to a trial by jury. I desire to waive these rights and to be tried in General Sessions Court on this warrant.

I plead guilty to the charge in this warrant.

Roger Hickman

NOTICE: The Tennessee rules of Criminal procedure provide that there is no appeal from a plea of guilty, except as to sentence.

WAIVER OF ATTORNEY

I understand that I have the right to an attorney and that if I am indigent and cannot afford an attorney the Court will appoint an attorney to represent me. It is my desire to waive my right to an attorney in this case.

_____

The District Attorney General does not object to this case being tried in General Sessions Court.

_____

Feb 20. cc

FINE & BILL OF COST

Litigation Taxes		17.25
I.F.		1.00
Library Tax		1.00
Judges Retirement		.50
Affidavit & Warrant		4.00
Judgment		3.00
Docketing		2.00
Bill of Cost		5.00
Arrest Fee		15.00
Jail Fees $33.50 & $33.50 per day		33.50
Mittimus	2.00	2.00
Bonds	7.75	7.75
Data Processing	2.00	2.00
Continuance	1.50	____
Issuing Subpoena	3.50	7.00
Serving Subpoena	5.00	10.00
Abstract	2.00	____
Docketing Abstract	2.00	____
Driver Lic. in Lieu of Bond	4.00	____
Issue Scire Facias & copy	6.50	____
Issue Attachment	5.00	____
Enter Judgment	3.00	____
Serving Scire Facias	11.00	____
Arrest on Forfeiture	15.00	____
Jail Fees on Forf.	8.00	____
Mittimus on Forf.	2.00	____
Bond on Forf.	7.75	____
Docketing Forf.	2.00	____
Final Forf.	5.00	____
County Tax	10.00	____
Criminal Injury $26.50 / $50.00		26.50
Total Cost		158.50
Fine		50.00
Total Fine & Cost		208.50

CERTIFIED TRUE COPY
MARTHA PHILLIPS, CLERK
GENERAL SESSIONS COURT
CRIMINAL DIVISION
KNOX COUNTY, TN
BY _____ 8-20-01
DEPUTY CLERK